

1 United States of America,)
 2)
 3 Plaintiff,)
 4 v.) No. CR-10-0217-DLJ
 5 Juan Ramon Hernandez-Martinez,)
 6 Defendant.) **ORDER**
 7 _____)

8 On November 2, 2010, defendant pled guilty to a violation
 9 8 U.S.C. § 1326, Illegal Entry Following Deportation. On March
 10 22, 2011, this Court sentenced defendant to 21 months
 11 imprisonment, 3 years supervised and a \$100 mandatory special
 12 assessment fee.

13 On April 3, 2011, defendant filed a motion to stay
 14 judgment of the sentence and to reopen the sentencing hearing.
 15 The Court held a hearing on the Motion on April 19, 2011.
 16 Defendant was represented at the hearing by attorney Vicki
 17 Young and the government was represented by AUSA Suzanne
 18 DeBerry. Having reviewed the papers and having heard oral
 19 argument on this matter, the Court finds the following.

20 I. Background

21 Juan Ramon Hernandez-Martinez was sentenced by this Court
 22 on Tuesday March 22, 2011. Prior to the sentencing hearing
 23 defense counsel had filed objections to the factual statements
 24 contained in the Pre-Sentence Report (PSR) regarding the
 25 defendant's 1994 California State Court conviction for Penal
 26 Code § 243.4. The PSR described the arrest, conviction and
 27 sentence for the prior sentence, as well as a description of
 28 the conduct by the defendant and a co-defendant named Zamora

1 associated with the incident.

2 Defense counsel objected that the statements regarding
3 this conviction were not reliable, and that the Court should
4 not consider them in imposing sentence. Defense counsel had
5 ordered the trial transcript for the co-defendant Zamora and
6 requested that the matter be continued until she had received
7 it. The Court declined to do so. The Court explained that the
8 fact that defendant had been convicted of a state violation in
9 1994 was properly before the Court as a sentencing circumstance
10 but that it would not consider the PSR statements as to the
11 underlying offense conduct in deciding the sentence to be
12 imposed. The Court determined that, but for those
13 circumstances, the information before it was sufficient to
14 proceed with sentencing.

15 The Pre-Sentence Report indicated that defendant fell into
16 Criminal History Category IV. At the sentencing hearing,
17 defense counsel argued that the court either should depart
18 downward to Criminal History Category III or should sentence
19 defendant at the middle the advisory guideline range for
20 Criminal History Category IV, a sentence of 18 months.

21 The Court found that defendant was appropriately in
22 criminal history IV based on a point count that did not include
23 the 1994 state conviction as it was too old; that the base
24 offense level was 10; and that the advisory guideline range was
25 15-21 months. The Court sentenced defendant within the
26 guideline range to a sentence of 21 months. In fashioning the
27 sentence the Court looked to the totality of circumstances

1 including defendant's prior criminal record.

2 Subsequent to sentencing defense counsel obtained a trial
3 transcript for the proceedings in the 1994 case which only
4 involved the co-defendant Zamora. The transcript of that case
5 revealed that the sentencing Judge, in an aside and in
6 retrospect, had reservations about Hernandez-Martinez' role and
7 in the offense and about the Judge's acceptance of defendant's
8 plea of guilty to an included offense. See TX, Volume VI,
9 People v. Rigoberto Espino Zamora, Case H013201, p. 1444,
10 attached as Exhibit A to defendant's Motion. No action was
11 taken at that time by the state court or anyone else to have
12 Hernandez-Martinez' conviction in the state action overturned
13 and his record of convictions stands as stated in the Pre-
14 Sentence Report.

15 Defendant argues that the Judge's statement in the Zamora
16 case is a sufficient basis for this Court to revisit the
17 sentence it imposed on Hernandez-Martinez.

18 II. Legal Standard

19 Federal Rule of Criminal Procedure 35(c) allows a district
20 court to alter a sentence only to "correct a sentence that was
21 imposed as a result of arithmetical, technical, or other clear
22 error" within seven days of the "imposition of sentence."
23 Subpart 35(c) provides that, "[a]s used in this rule,
24 'sentencing' means the oral announcement of the sentence." The
25 authority of the district court to modify a sentence pursuant
26 to Rule 35 is severely limited. See Advisory Committee Notes
27 concerning the 1991 Amendment to Rule 35.

1 III. Discussion

2 The Court has reviewed the proscriptions of Rule 35 and
3 finds no basis in the Rule which would allow the Court to
4 revisit the sentence were it inclined to do so. Moreover, even
5 if the Court had the authority to change the sentence, the
6 Court would not have imposed a different sentence based on the
7 state court Judge's comments in the Zamora case.

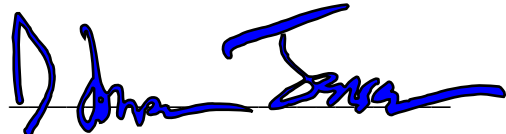
8 The Court notes first that the sentence it imposed upon
9 defendant was within the advisory guideline range. Nor does
10 anything which defendant has submitted change the calculation
11 of defendant's criminal history, as the objective fact of the
12 earlier conviction still stands despite any misgivings the
13 trial court may have had about it subsequently. Moreover,
14 while the Court considered the fact of the 1994 conviction as
15 part of the totality of circumstances before the Court in the
16 sentencing hearing. The Court did not use the substance of
17 that conviction or its underlying circumstances in any way in
18 imposing the sentence for the defendant. The Court would have
19 carried out the same analysis even if it had known of the state
20 court Judge's comments.

21 IV. Conclusion

22 For all of the reasons state above, the Court DENIES
23 defendant's Motion for Reconsideration or to Reopen Sentence.

24 IT IS SO ORDERED.

25 Dated: April 22, 2011



26 D. Lowell Jensen
27 United States District Judge
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